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Citations: Suggestions for Citing Authority Without Distracting the Reader

Notes/Citation Information

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For more than 20 years, Bryan Garner has encouraged practitioners and judges to “unclutter”¹ their writing by moving the reference portion of citations to footnotes.² Specifically, Garner recommends incorporating the

CITATIONS:¹

portion of the citation demonstrating the persuasive value of the source (the date and court) into the text of the sentence and relegating the reporter name and volume and page numbers to a footnote.³ In his column in the February 2014 ABA Journal, Garner again promotes this approach to citation.⁴

Although some practitioners and judges have embraced Garner’s approach, others, including his coauthor Supreme Court Justice Antonin Scalia, have not.⁵ Criticisms of the move to footnotes include that it requires the reader to “bounce” between text and footnote, that sentences containing the date and court information would hurt the flow of the writing, and that some judges will be resistant to this “novel” change.⁶ Since Garner initially touted footnotes in lieu of in-text citations, technology has posed another obstacle to the use of footnotes: judges and lawyers reading a brief on a tablet cannot see the footnote without scrolling to the end of the document.⁷

Regardless of one’s ultimate decision regarding the use of footnotes in briefs and opinions,⁸ Garner’s general premise that citations can “clutter” legal writing is an ac-

SUGGESTIONS FOR CITING AUTHORITY WITHOUT DISTRACTING THE READER

By: Kristin J. Hazelwood

curate one. Relegating the reference portion of the citation to a footnote is not the only way, however, for one to “unclutter” writing. Adopting the four suggestions I propose below will help accomplish that same goal.

1. **Limit string citations.** The temptation to string cite is easy to understand; tedious research has uncovered many relevant cases, and the lawyer wants to use that research in the brief. Cases, however, are typically not won or lost based on the number of cases that each lawyer finds.⁹ Even more importantly, that lengthy citation can distract the reader from the brief’s important points.

1 Kristin J. Hazelwood, Citations: Suggestions for Citing Authority without Distracting the Reader, Bench & Bar Magazine (May 2014)

That’s not to say that one should banish all string citations from a brief. To the contrary, string citations, when used properly, can serve an important function. They can be used effectively to show the weight of the authority on a contested point of law or perhaps a developing trend in other jurisdictions. Even in those instances, choose the sources for the citation carefully.

Choose only the most helpful cases¹⁰ and indicate that the list is not comprehensive by using the signal *e.g.*, (or, when appropriate, *see, e.g.*).

2. **Keep citations at the end of the sentence.** *Bluebook* Rule B2 establishes two forms for citations: citation sentences and citation clauses. Citation sentences are used when the cited authority supports the entire sentence and go after the sentence. Citation clauses are used when the cited authority supports only part of the sentence and are inserted within the sentence immediately after the text that the citation supports. Citation clauses, therefore, disrupt the flow of the writing and can be very distracting to the reader. A less distracting alternative is to break the sentence into multiple sentences; sentences that require citation clauses are often overly complex, and the writer could make the point more effectively by simplifying the sentence structure. Restructuring the sentence to put the material that the authority supports at the end of the sentence is an additional alternative for the sentence that requires citation for only its beginning.

3. **Use explanatory parentheticals to explain the significance of a citation, but not to replace text.** According to *Bluebook* Rule B11, explanatory parentheticals are used to “include additional information to explain the relevance of the cited authority.” Explanatory parentheticals should not, however, be the sole source of important points that the reader needs to understand in order to be persuaded of the writer’s position. First, readers tend to skim citations and could miss the point. Second, relegating the point to a parenthetical sends a message to the reader that the point is not as important as other points. Finally, pursuant to Rule B11, explanatory parentheticals are short phrases or quotes and

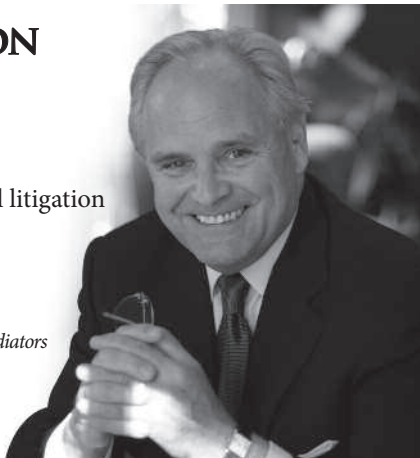
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do not lend themselves to eloquent articulation of a key idea.

4. **Avoid unnecessary repetition.** Citations can become distracting when they repeat information. For example, if the text includes the case name, it is not necessary to repeat the case name in the citation. Here's an example of what the sentence should look like: In *Duncan v. Louisiana*, the Court ruled that the right to a jury trial for serious offenses is a fundamental right. 391 U.S. 145, 157-58 (1968). The reader knows from the text the name of the case, and the citation need not repeat it.

The debate regarding in-text citations and footnotes is not likely to end soon. Until courts adopt local rules that decide the issue or the editors of the *Bluebook* provide different instruction, adopting the suggestions described above will help "unclutter" legal writing and keep the focus on the writing's key points. **B&B**



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¹ Bryan Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, A.B.A. J. (Feb. 2014), available at http://www.abajournal.com/magazine/article/textual_citations_make_legal_writing_onerous_for_lawyers_and_non-lawyers/.

² Garner, *supra* note 1, at 1; Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 132 (2008).

³ Scalia & Garner, *supra* note 2, at 132-33. Garner provides this example of how the sentence would appear in the text: "The conflict here hinges on the meaning of *Hammond Packing Co. v. Arkansas*, decided by the Supreme Court in 1909."

⁴ Garner, *supra* note 1, at 1.

⁵ Garner, *supra* note 1.

⁶ Scalia & Garner, *supra* note 2, at 133-35.

⁷ Rich Phillips, *The Great Footnote Debate (A Response to Bryan Garner)*, available at <http://www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html>.

⁸ *The Bluebook: A Uniform System of Citation* provides in Rule B2 that "[i] non-academic legal documents, citations appear within the text of the document as full sentences or as clauses within sentences directly after the propositions they support." With respect to footnotes, Rule B2 states that "footnotes should only be used in non-academic legal documents when permitted by local court rules." Rule 76.12 of the Kentucky Rules of Civil Procedure does not provide instruction on the location of the citation.

⁹ Scalia & Garner, *supra* note 2, at 125-26.

¹⁰ By including a case in the brief, even in just a string citation, the case is highlighted for opposing counsel and for the judge. Neglecting to make careful choices about the cases included in the citation could result in the lawyer highlighting a case that actually harms the client's position.

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